

**Field Level Agreement for Federal Enforcement of the  
Section 404 Program of the Clean Water Act  
between the  
U.S. Army Corps of Engineers  
Omaha District of the Northwestern Division,  
Albuquerque and Sacramento Districts  
of the South Pacific Division,  
and the  
U.S. Environmental Protection Agency, Region 8**

**Purpose and Scope**

The U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) have enforcement authorities for the section 404 program, specified in sections 301(a), 308, 309, 404(n), and 404(s) of the Clean Water Act (CWA). The January 19, 1989, national memorandum of agreement between the Corps and EPA concerning enforcement of the section 404 program (1989 MOA) encourages the Corps and EPA to enter into local interagency field level agreements (FLAs). (See Section IV.B of the 1989 MOA.) The Omaha District of the Corps' Northwestern Division, the Albuquerque and Sacramento Districts of the Corps' South Pacific Division (Districts), and EPA Region 8 (Region 8) hereby establish policies and procedures to undertake enforcement of the section 404 program of the CWA within the Region 8 boundaries serving Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming, and 27 tribal nations. This FLA is consistent with the 1989 MOA and 33 C.F.R. Part 326.

The purpose of this FLA is to enable the Corps and Region 8 to more effectively and efficiently use their section 404 enforcement resources by improving communication, establishing a framework to strengthen the enforcement program, and reducing overlapping agency work efforts. Nothing in this FLA is intended to diminish, modify, or otherwise affect the policies and procedures established in the 1989 MOA or 33 C.F.R. Part 326.

**General Coordination**

Quarterly Meetings

Region 8 shall hold regularly scheduled meetings (in person or via conference call) with corresponding staff from each of the Districts to discuss the status of all cases currently referred to Region 8 (including cases subsequently referred by Region 8 to the U.S. Department of Justice), as well as potential cases being processed for referral by the Districts. These meetings shall be used to ensure that violations are pursued in a consistent manner, as a means of coordinating enforcement workload within Region 8,

and as a forum to discuss appropriate issues in the enforcement arena. Meeting attendees shall include the District-level regulatory enforcement coordinator, the chief of each Corps field office and/or delegated staff, and the section 404 enforcement officers from Region 8.

#### Annual Meetings

Region 8's Water Technical Enforcement Program Director and appropriate enforcement staff shall have an annual enforcement program review meeting (in person or via conference call) with the three respective District regulatory chiefs and/or their enforcement coordinators and lead regulatory staff to discuss the enforcement program and current program issues, to identify areas of special concern, to evaluate the effectiveness of this FLA, and to recommend modifications to the FLA and enforcement procedures, where necessary.

#### Case Specific Meetings

In general, with respect to specific cases, direct communication between Region 8 enforcement staff and District project managers is preferred. District project managers will keep their immediate supervisors and the District enforcement coordinator abreast of all meetings and Region 8 requests.

### **General Enforcement Guidelines**

#### Enforcement Lead Agency

Section 404 program violations are initially investigated to determine what type of case may exist. Region 8 will act as the lead enforcement agency when the unpermitted activity involves a repeat or flagrant violation, when Region 8 requests the particular case, when the activity is of a particular type previously requested by Region 8, or when it is a case in which the Corps believes an EPA administrative penalty may be warranted.

The Corps will act as the lead enforcement agency in all other unpermitted cases not identified above and in all cases of Corps-issued permit condition violations. However, if Region 8 requests the Corps to take action on a permit condition violation and the Corps, while in agreement that a permit condition has been violated, declines, or defers to Region 8, or is unable to proceed as the lead agency, Region 8 may assume those responsibilities.

When either the Corps or Region 8 notifies the other that, because of limited staff resources or other reasons, it will not take an action on a violation, the other agency may take an enforcement action commensurate with resource availability. However, a determination by the Corps that the activity is in compliance with a permit will represent a final decision for that case.

The lead agency shall determine what remedial actions (e.g., restoration, compensatory mitigation) are required and determine when the violation is resolved. These decisions normally will be coordinated with all appropriate local, state, tribal, and Federal agencies. In addition, or as required (e.g., Endangered Species Act compliance), the views of other

Federal, state, and local agencies also may be solicited, as time and resources allow, for incorporation into environmental protection measures. The lead agency will be responsible for the proper coordination with other agencies involved in any related enforcement action resolutions. The lead agency also will be ultimately responsible for the proper oversight of all remedial actions.

#### Unpermitted Activities

Unpermitted activities include: (1) discharges of dredged or fill material for which an individual permit is required but was not previously obtained, and (2) discharges of dredged or fill material that are in violation of one or more terms or conditions of a general permit, including nationwide permits, and a permit verification letter was not previously obtained.

#### Corps-Issued Permit Condition Violations

Corps-issued permit condition violations are those discharges of dredged or fill material found to be in noncompliance with one or more terms or conditions of an individual permit (IP) or a general permit verification letter.

#### General Permits

General permits can be nationwide permits (NWP), regional general permits (RGPs), or programmatic general permits (PGPs).

#### Individual Permits

IPs can be standard permits (SPs) or letters of permission (LPs).

#### Repeat Offender

A repeat offender is a party who has one or more documented prior instance(s) of discharging dredged or fill material into waters of the United States without a section 404 permit or who has one or more documented prior instance(s) of being out of compliance with a previously issued section 404 permit. Documentation may include, but is not limited to, cease and desist (C&D) letters, notices of violation (NOVs), administrative orders (AOs), notices of noncompliance, after-the-fact (ATF) permits, field investigation records, or other information as appropriate.

#### Flagrant Violation

A flagrant violation is a violation conducted by a party who has documented prior knowledge that a section 404 permit is required for discharging dredged or fill material into waters of the United States. Examples of documented prior knowledge may include, but are not limited to, previously issued section 404 permits, jurisdictional determinations, wetland delineations, previous section 404 permit applications, applicable communication records, or previous section 404 program violations.

#### EPA-Requested Specific Cases

If Region 8 intends to request a specific case after receiving a copy of the Corps' notification letter to the alleged violator, including those cases for which the 1989 MOA would ordinarily designate the Corps as the lead, Region 8 will make such a request in

writing within 21 calendar days of the date of the Corps' notification letter. Region 8's written request will formally notify the Corps of Region 8's desire to act as the lead agency for the enforcement of the case. This written notification may be through a formal letter or email from Region 8's Water Technical Enforcement Program Director to the applicable Corps Regulatory Division or Branch Chief.

#### Special Class of Cases

Consistent with the procedures found in Section III.D.1 of the 1989 MOA, Region 8 may formally identify a special class of cases in writing to the appropriate Corps district or division. Once requested, all subsequent cases involving similar unpermitted activities will be referred to Region 8 until the request is formally rescinded in a letter from Region 8 to the Corps district or division.

#### Multiple CWA Authority Cases

EPA has independent enforcement authority under the CWA. Cases that involve more than section 404 permit noncompliance, such as violations of the section 402 program of the CWA, may be coordinated with the appropriate state officials and potentially referred to Region 8 for enforcement. However, if the Corps determines that an activity in question is in compliance with an applicable CWA section 404 permit, then that determination shall be binding on Region 8.

#### Section 10 and Section 404 Program Cases

Generally, when an unpermitted activity violates both the section 404 program of the CWA and section 10 of the Rivers and Harbors Act, restoration/mitigation for the unpermitted activity usually is sufficient to resolve the section 10 violation. However, whenever a case is referred to Region 8 that involves a violation of both acts, Region 8 will work closely with the Corps to ensure that a decision not to take action does not compromise the Corps' ability to proceed with enforcement under section 10.

#### Freedom of Information Act (FOIA)

Prior to releasing any documents pursuant to a FOIA request, the agency subject to the request will consult with the agency that generated the documents proposed to be released. Typically, each agency will forward its own documents to the requestor.

#### Copies Furnished

Copies of all NOV's and C&D letters issued by the Corps for unpermitted discharges shall be sent to Region 8 and other relevant Federal, tribal, state, and local agencies, regardless of whether they meet the criteria found in Section III.D.1 of the 1989 MOA. Notices of noncompliance with permit conditions issued by the Corps also will be sent to Region 8. Likewise, Region 8 will send a copy of all its CWA section 308 requests, administrative enforcement actions, and other case-related correspondence (e.g., plan comments and approvals, violation letters, etc.) to the appropriate Corps field office chief and District enforcement coordinator and other relevant Federal, state, tribal, and local agencies regardless of whether they meet the criteria found in Section III.D.2 of the 1989 MOA.

## **Procedures**

These procedures are consistent with and supplemental to the procedures specified in 33 C.F.R. Part 326, 33 U.S.C. § 401 et seq., 33 U.S.C. § 1344, and Section III of the 1989 MOA.

### Initial Investigation

In most situations, discovery and initial investigation of an alleged violation will be completed by the Corps. The inspection detail will be commensurate with the alleged case significance to the regulatory program and the environment, and as time and resources allow. While weather and workload may affect the response time, significant delays in the initial investigation must be avoided. If delays are foreseen, the local Corps office will take steps to obtain support for completing the initial investigation.<sup>1</sup> In most cases, the Corps will conduct an initial investigation to confirm whether a violation exists. Once confirmed, an investigation report will be prepared and a notification consistent with 33 C.F.R. § 326.3(c) shall be sent to the alleged violator.

### Initial Investigation Report

The initial investigation report shall address each of the required elements of a CWA section 404 program violation and provide a description of the illegal activity, the existing environmental setting, an initial view on potential impacts, and a recommendation on the need for initial corrective measures.

### Notices of Violation and Cease and Desist Letters

Once the Corps has determined that a violation exists, the Corps will issue a formal notification to the party responsible for the violation. The NOV or C&D letter may contain, if conditions warrant, an order for initial corrective measures. Initial corrective measures, described below, are not to be confused with a request for voluntary restoration. A copy of these letters will be sent to Region 8.

### Request for Voluntary Restoration

Voluntary restoration should be requested in the violation letter only when restoration will likely eliminate current and future detrimental impacts to the satisfaction of the Corps. The Corps should conduct informal coordination with the applicable agencies during the initial investigation to determine the appropriateness of a restoration request. Restoration scheduling will be subject to case-specific conditions but, ideally, restoration should be completed within 120 days of the date of the violation notice. In most cases, requests for voluntary restoration should not be extended to repeat or flagrant violators.

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<sup>1</sup> When Region 8 discovers a case with potential violations of the CWA section 404 program (e.g., through citizen complaints or other sources), Region 8 will coordinate with the Corps district where the potential violation allegedly occurred to evaluate if the dredge or fill activity was permitted and/or should be investigated. In cases of citizen complaints received by EPA, following which the Corps performs an initial investigation, the Corps will provide its findings to EPA as soon as practicable.

### Initial Corrective Measures

Initial corrective measures are justified only when there is potential jeopardy to life, property, or important public resources that may occur before a violation can be resolved. The Corps may issue an order for initial corrective measures to the parties responsible for the violation, consistent with the procedures outlined in 33 C.F.R. § 326.3 (d). In determining whether or not to order initial corrective measures, the Corps will solicit the views of Region 8, the U.S. Fish and Wildlife Service, and other Federal, state, tribal, and local agencies, as appropriate. Any order for initial corrective measures will identify the threat, specify the immediate measures required, and include a timeline for completing the work. The initial corrective measures order should normally specify that compliance with the order will not foreclose the government's options to initiate appropriate legal action.

### Case Referral Procedure

Whenever the Corps identifies an unpermitted discharge of dredged or fill material, as described above and consistent with Section III.D.1 of the 1989 MOA, the Corps will notify Region 8 initially through the NOV or C&D letter to the alleged violator. To ensure consistency, cases will be coordinated with the appropriate Corps field office supervisor, the Corps district enforcement coordinator, and Region 8 enforcement staff. The coordination will be informal and will occur prior to referral. Once the investigation and coordination are completed, the Corps will submit a referral package to the Region 8 Water Technical Enforcement Program Director.

### Referral Package

The Corps referral package sent to Region 8 will include a copy of the administrative record and the Lead Enforcement Agency Identification form, attached hereto as appendix A. The referral package sent to Region 8 also will include a jurisdictional determination (JD), consistent with national guidance in effect at the time of referral, with supporting hydrologic, vegetation, and soils information.<sup>2</sup> The referral package also will include the initial investigation report, the results of an applicable OMBIL<sup>3</sup> Regulatory Module (ORM) search,<sup>4</sup> color copies or color scans of pictures in the record, and other items identified in the Section 404 Enforcement Case Referral Checklist, attached hereto as appendix B.

### Lead Acceptance

Within 45 days of its receipt of a referral package, Region 8 will provide written notification to the Corps of its decision to accept or decline the lead enforcement agency role in the matter. In some instances, EPA may request additional information or time to review the referral package, in which case the total review time should not exceed

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<sup>2</sup> The JD will establish that a discharge of dredged or fill material occurred in a water of the United States, but may not necessarily establish the limits of the water of the United States. A JD prepared by the Corps for an enforcement action may not be appealed by the land owner/violator under the Corps' administrative appeals regulations (33 CFR Part 331).

<sup>3</sup> Operations and Maintenance Business Information Link

<sup>4</sup> The Corps also will initiate nationwide ORM searches at Region 8's request.

90 days. Following acceptance of the lead enforcement agency role, all inquiries received by the Corps regarding the case will be directed to Region 8.

From this point forward, the Corps' involvement in the case is in support of Region 8. The Corps may provide technical review and information, and may participate in field and office meetings when requested by Region 8. Region 8 will be the point of contact for the alleged violator and any other case inquiries. Corps support may be requested by Region 8 for activities such as assembly of additional information necessary to support JDs, wetland delineations, violation site impact assessments, restoration/mitigation plan review, evaluation of supplemental environmental projects (SEPs), aerial photograph interpretations, etc. Corps support will be subject to funding and workload limitations.

### **After-the-Fact Permitting**

Consistent with 33 C.F.R. § 326.3(e) and Section III.G of the 1989 MOA, no ATF permit application shall be accepted by the Corps until resolution of the enforcement action has been reached, as determined by the lead enforcement agency (e.g., until all administrative, legal, and/or corrective action has been completed or a decision has been made that no enforcement action is to be taken). The Corps will not accept an ATF permit application when a Federal, state, or local authorization or certification, required by Federal law, already has been denied or there is enforcement litigation initiated by another Federal, state, or local regulatory agency, unless it is clearly appropriate. No appeal of an approved JD associated with an unpermitted activity or ATF permit application will be accepted unless and until the applicant has furnished a signed statute of limitations tolling agreement.

At the conclusion of Region 8's enforcement action or its decision to decline the enforcement lead, if dredged or fill material is allowed to remain in waters of the United States, Region 8 may provide its opinion to the Corps concerning the appropriateness of authorization under NWP 32 – Completed Enforcement Actions or processing the activity using an ATF individual permit. During the case resolution, Region 8 will coordinate with the Corps to ensure that no potential permitting issues exist.

Cases returned to the Corps for resolution will most often be permitted through verification of a NWP 32. However, this will only occur after a settlement agreement approved by the applicable Corps Office of Counsel has been executed with the alleged violator. The Corps will rarely process an application for a section 404 ATF IP.

In the rare event that an ATF IP is processed, it will be processed pursuant to 33 C.F.R. § 326.3(e). During the ATF permit evaluation process, Region 8 may submit comments consistent with the requirements of the section 404(q) MOA and/or during the public notice comment period, if required. Should an ATF permit be denied, the Corps may order removal and/or restoration.

## General FLA Provisions

This FLA is subservient to the provisions of the 1989 MOA. Execution and implementation of this FLA is subject to the availability of appropriate funding by each signatory party.

This FLA may be modified, as necessary, by mutual agreement of all parties, by a written amendment signed and dated by an authorized representative of each party.

Any party may terminate its participation in this FLA, without cause, by providing 30 days written notice to the other parties.

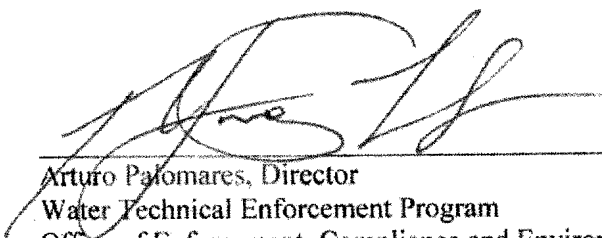
This FLA shall take effect 10 days after the date of the last signature below and will continue until terminated.

Nothing in this FLA is intended to require an agency to obligate or expend funds in advance of, or in excess of, available appropriations. In addition, this FLA cannot be used to obligate or commit funds or as the basis for transfer of funds.

Any endeavor involving reimbursement or contribution of funds between the Corps and EPA will be handled in accordance with applicable laws, regulations, and procedures. Such endeavors, if any, will be outlined in separate agreements that shall be made in writing by representatives of the parties and shall be independently authorized by appropriate statutory authority. This FLA does not provide such authority.

The policies and procedures contained in this FLA do not create any rights, either substantive or procedural, enforceable by any party regarding an enforcement action brought by either agency or by the United States. Deviation or variation from these FLA procedures will not constitute a defense for violators or others concerned with any section 404 program enforcement action.


This FLA may be signed in counterparts and such counterpart signature pages shall be given full force and effect.

  
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Arturo Palomares, Director  
Water Technical Enforcement Program  
Office of Enforcement, Compliance and Environmental Justice  
U.S. Environmental Protection Agency-Region 8

Sept 9, 2015  
Date



Field Level Agreement for Federal Enforcement of the  
Section 404 Program of the Clean Water Act  
between the  
U.S. Army Corps of Engineers  
Omaha District of the Northwestern Division,  
Albuquerque and Sacramento Districts  
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and the  
U.S. Environmental Protection Agency, Region 8



Martha S. Chieply  
Chief, Regulatory Branch  
Omaha District  
U.S. Army Corps of Engineers

27 Sept 2010  
Date

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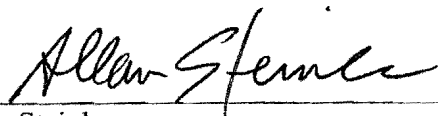


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Michael S. Jewell  
Chief, Regulatory Division  
Sacramento District  
U.S. Army Corps of Engineers

10 Sep 2010  
Date

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between the  
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Allan Steinle  
Chief, Regulatory Division  
Albuquerque District  
U.S. Army Corps of Engineers

8 Sept 10  
Date

**Appendices:**

Appendix A - Lead Enforcement Agency Identification Form

Appendix B – Section 404 Enforcement Case Referral Checklist

## **LEAD ENFORCEMENT AGENCY IDENTIFICATION**

The purpose of this form is to document the lead enforcement agency designation in accordance with the “Memorandum of Agreement (MOA) Between the Department of the Army and the Environmental Protection Agency (EPA) Concerning Federal Enforcement of the Section 404 Program of the Clean Water Act” dated January 19, 1989.

### **I. INFORMATION**

1. Corps File Number:
2. Location (Lat/Long, Section, Township, Range):
3. Landowners:
4. Contractors:
5. Violators:
6. Date Violation Occurred:
7. Date of Investigation & Corps Investigators:
8. Description of Unauthorized Activities:
9. Classification from Part III. D(1):
  - a. Repeat Violator(s)
  - b. Flagrant Violator
  - c. Particular Case EPA May Request
  - d. Corps Recommends Administrative Penalty
10. Completed Inspection Report (w/photos, maps, and an estimate of impacts in acres, linear feet, and/or cubic yards), and Preliminary Jurisdictional Determination Attached:
11. ORMS Database Query Results for Landowners, Contractors, and/or Violators Attached:
12. Corps Recommendations for Resolution:

**II. EPA DETERMINATION**

- ( ) EPA will act as lead enforcement agency.
- ( ) EPA declines the lead enforcement agency role and refers the matter back to the Corps pursuant to Part III. D(2) of the MOA. EPA's recommendations are:

**If applicable:**

EPA requested additional time (*date, time, Corps contact*): \_\_\_\_\_  
\_\_\_\_\_

EPA requested additional information (*date, time, Corps contact, type of info*): \_\_\_\_\_  
\_\_\_\_\_

**III. JOINT ENFORCEMENT STRATEGY (if applicable)**

Corps Lead:

EPA Lead:

**IV. CERTIFICATION (must be completed)**

	<b>Corps Representative</b>	<b>EPA Representative</b>
Name/Title		
Signature/Date		

# Section 404 Enforcement Case Referral Checklist

## Required Items

- \_\_\_ Completed lead enforcement agency identification form
  
- \_\_\_ Initial investigation report
  - Responsible parties (e.g., violators, landowners, contractors, operators) with contact information (names, addresses, phone numbers)
  - Location map and description, lat./long., section, township, range
  - Site photographs, including descriptions, with a reference map and legend showing each photograph location by number and direction (ideally with GPS coordinates, date, and time)
  - Fill description, including type and estimated volume of dredged/fill material
  - Estimate of impacts by aquatic resource name and type (acres, linear feet, and/or cubic yards)
  
- \_\_\_ Jurisdictional determination
  
- \_\_\_ ORM2 query results for: current and past permits issued for the site and/or to the violators, landowners, contractors, and operators anywhere anywhere; prior violations committed by the responsible parties; prior CWA 404 activity demonstrating knowledge of the program by the responsible parties
  
- \_\_\_ Copies of ALL records in the case file including:
  - Cease & desist / notice of violation letters
  - Initial corrective measures required
  - Incoming and outgoing correspondence, including emails
  - Phone logs, conversation records

## Additional Items To Provide, If Available

- \_\_\_ Wetland delineation
- \_\_\_ Potential endangered species impacts
- \_\_\_ Potential cultural or historic resource impacts
- \_\_\_ Tribal issues
- \_\_\_ Documentation/discussion of cumulative and secondary impacts
- \_\_\_ Property ownership information (tax parcel ID & deed)
- \_\_\_ Consultant information
- \_\_\_ Historic aerial photographs
- \_\_\_ USGS topographic maps, soil surveys, NWI maps, FEMA maps, etc.
- \_\_\_ USGS gauging station location/ stream flow data
- \_\_\_ Stream profile measurements
- \_\_\_ Local precipitation data (current and historic)
- \_\_\_ Aerial photographs and site photographs of hydrologic connections
- \_\_\_ Receiving water status (303(d) listed, designated use, water supply, priority water).